

Indonesian Environmental Law: Environmental Justice System and Enforcement¹

I NYOMAN NURJAYA

*Dosen Fakultas Hukum Universitas Brawijaya
Jl.MT Haryono Nomor 169 Malang 65145*

A. INTRODUCTION

The essence of the environment is actually the essence of human life. It refers to the air, water, land, forest, river, lake, coast, sea, oil and gas, mining and mineral, flora and fauna (biological diversity) and everything within the earth and natural resources contained therein. It is, therefore, human environment defined as a unity of the spatial entity with all objects, potentials, conditions and living organisms, including man and his behavior, which influence the continuance of the life and welfare of human being and other living organisms. Human environment is naturally a system of life comprising the organic natural environment, inorganic natural environment, social environment, and the man-made environment, which influence the continuity of life and the welfare of human being and other living organism.²

Indonesia has been well known as a rich country in term of its natural resources and biological diversity in all over the world. Nevertheless, since the last more than three decades it could be witnessed that both natural resources stock and commodity of Indonesia have been decreasing and degrading in the sense of their quality and quantity in accordance with the rapid execution of economic development in the country. As such, natural resources mainly forest, gas and oil, mining, and fishery have widely been

explored and exploited in the name national development and enhancing State revenue reason in particular. Consequently, national development which mainly directed and targeted to keep increasingly economic growth and especially the development of State revenue must be costly paid by a serious economical loss and ecological degradation, as well as social and cultural destruction in the life of local communities in most regions of Indonesia.³

The implications of those ecological, economical, social and cultural losses mentioned above are primary caused by the differentiation both interest of natural resources tenure and control and management between Central Government and the local people. In the eyes of academic lawyer, the implications of which are particularly caused by the differential perception to deal with natural resources policies, laws and regulations between Central Government and the Local Communities in the regions. In this respect, the Government tends to enforce State laws namely laws and regulations to order and control resources in the name of development, and on the other side the local people employ their customary (*adat*) laws to control and manage natural environment in the territories they depend on. Hence, conflicts over natural resources laws and management between Government and the local people then could not be deflected in most regions of Indonesia.⁴

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² Richard L. Revesz, *Foundations of Environmental Law and Policy*, Oxford University Press, New York, 1997. p. 5.

³ John Bodley, *Victims of Progress*, Mayfield Publishing Company, California, 1982; Robert Repetto & Malcolm Gillis, *Public Policies and the Misuse of Forest Resources*, Cambridge University Press, New York, 1988; I Nyoman Nurjaya, *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum*, UM Press, Malang, 2006.

⁴ Charles V. Barber, "The State, The Environment and Development : The Genesis of Social Forestry

Environmental Law is a subject that has attracted a great deal of attention in the last three decades among law academics and scholars, government and law enforcement officials, as well as law students and lawyers. This is consistent with the escalating natural environmental problems that are faced by both developed and developing countries all over the world, and in the country of Indonesia in particular.

In the case of Indonesia, the subject of environmental law was first introduced and taught at the selected Faculties of Law in the country since 1982, in the same year as the enactment of Basic Human Environment Management Act of 1982 (UU Nomor 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup). In 1997 this Act was then replaced by the Human Environment Management Act of 1997 namely UU No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup. This later legislation was developed to improve and establish its role and function in coping and handling various living environmental problems and cases that continue to occur in conjunction with the rapid implementation of national development in the country. Within the universities, the legislation has contributed to the enrichment and development of the subject of environmental law for academic research and teaching purposes.

This paper attempts to examine the development of environmental law and its substances with special reference to the environmental justice system and enforcement in the country of Indonesia. Discussion will begin from the explanation of ideology of the State in controlling managing natural environment and resources which based on the 1945 Constitution particularly Article 33 Paragraph 3 and the existing laws and

regulations which relate to the management of natural resources and environment. It will be sustained to the short description regarding historical background of the establishment environmental law of Indonesia. Environmental justice system and enforcement which normatively defined and regulated within the Human Environment Management Act of 1997 will be afterward discussed and analyzed in order to understanding on how the development of environmental law system of Indonesia has been established in accordance to the national law development of Indonesian as a whole.

B. HUMAN ENVIRONMENT CONTROL AND MANAGEMENT: IDEOLOGY OF THE STATE AND THE EXISTING LAWS

Environmental Law encompasses all the protections for the human environment that emanate from the Constitution, laws and regulations promulgated by the State, and local regulatory agencies, court decisions interpreting these law and regulations. Hence, it has been defined to be a set of legal rules addressed specifically to activities that potentially affect the quality of the human environment, whether natural, social and man-made environments.⁵

For the Indonesian context, the ultimate source of authority for State control over natural environment is the 1945 Constitution (UD 1945), and particularly Article 33 Paragraph 3, which defines :

Land and water and the natural resources contained therein shall be controlled by the State and be utilized for the greatest welfare of the people.

⁵ Myrna S. Feliciano, Amando S. Tolentino Jr., Eduardo A. Labitag., Walfrido E. Gloria, and Antonio A. Oposa Jr. (1992), *Environmental Law in The Philippines*, Law Centre, Institute of International Legal Studies University of The Philippines, Manila. p.2.

Transformation in New Order Indonesia", Unpublished Doctoral Dissertation University of California, Berkeley, 1989; Nancy L. Peluso, *Rich Forest Poor People Resource Control and Resistance in Java*, University of California Press, Berkeley, 1992; Richard L. Revesz, *Foundations of Environmental Law and Policy*, Oxford University Press, New York, p. 3.

This is the so called Ideology of the State in controlling and managing natural environment in the territory of Indonesia. This Ideology of the State is then employed to establish the national development paradigm namely Economic Growth Development which outlined within Garis-garis Besar Haluan Negara 1999-2004 (GBHN/the Broad Guidelines of State Policy). Hence, the State's paradigm in relation to natural environment management i.e. State-based Natural Resources Management enforced to support implementation of the Economic Growth Development focusing its objective mainly to enhance State revenue.

The resources management paradigm mentioned above is further elaborated and break-downed into the National Development Program which defined and regulated on Act No. 25/2000 concerning Program Pembangunan Nasional (PROPENAS). At present time, those of National Development Programs has been formulating as the Long-term National Development Program which defined within UU No. 25 Tahun 2004 tentang Sistem Perencanaan Pembangunan Nasional (National Development Planning System). This national development program should then be supported by State law as legal instruments namely laws and regulations regarding natural environment and resources management. Therefore, the control of access to natural resources and environment become much more than a State Ideology and Legal Configuration of the State. In this sense, laws and regulations allocate natural resources access, control and use, establish the mechanism of management, and articulate principles and norms of the State pertaining to natural resources and environment. In other word, this is the so called the Ideology of State Authority and Legitimacy in controlling and managing natural resources and environment in the country (Barber, 1989; Peluso, 1992).

The basic principle of control over natural environment mentioned above are clearly defined and reaffirmed within the existing national laws which relate to natural environment and resources management. Those are as follows :

1. Basic Agrarian Act No. 5/1960 (UU No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria);
2. Basic Mining Act No. 11/1967 (UU No. 11 Tahun 1967 tentang Ketentuan-ketentuan Pokok Pertambangan);
3. Industrial Act No. 5/1983 (UU No. 5 Tahun 1983 tentang Perindustrian);
4. Water Resource Act No. 7/2004 (UU No. 7 Tahun 2004 tentang Sumber Daya Air);
5. Exclusive Economic Zone Act No. 5/1983 (UU No. 5 Tahun 1983 tentang Zona Ekonomi Eksklusif);
6. Fishery Act No. 31/2004 (UU No. 31 Tahun 2004 tentang Perikanan);
7. Biological Diversity Conservation Act No. 5/1990 (UU No. 5 Tahun 1990 tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya);
8. Spatial Use Act No. 24/1992 (UU No. 24 Tahun 1992 tentang Penataan Ruang);
9. Human Environmental Management Act No. 23/1997 (UU No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup);
10. Forestry Act No. 41/1999 (UU No. 41 Tahun 1999 tentang Kehutanan).

If we do analyze the legal norms and substances of those natural environment and resources laws in-depth and comprehensively, we are able to identify characteristics of the laws which indicate bias perception and policy of the Government in understanding natural resources and environment as the only economical commodity, and not as an ecological system or system of human life, that can be exploited to the improvement of State revenue in the name of national development. Those characteristics are mainly as follows :

1. In the sense of their roles and functions, these laws are exploitation and use-oriented and that the ecological conservation ignorance in order to keep the State revenue increasingly;
2. In term of utilization opportunity provided, these laws are very capital-oriented and that means the only big enterprises, rich and high capital corporations can take the commercial opportunity in utilizing natural resources;

3. In respect of resources management regime, these laws are centralistic and top-down management, and or State-based resources management, and therefore ignoring regional and community-based management regime;
4. In term of the State's institutions in managing resources, that means each component of natural resources separately controlled and managed by respective institution supported by its own laws and regulations, and of absence coordination mechanism between sectors;
5. In the sense of policy making processes, these laws tends to ignoring transparencies and public participatory involvement in the process of decision and policy making;
6. In respect of community rights recognition, these laws tends to disregard the existing indigenous property rights with deal to natural resources tenure, use and management;
7. In term of legal pluralism ideology, these State laws tends to neglect the fact of legal pluralism in the life of customary laws within *adat* communities in particular within Indonesia's system of law.⁶

In sum, it could be mentioned that national laws and regulations with deal to environment and natural resources management have become the idiom for expression of State's authority and legitimacy to control resources tenures and management. It is clear that those have systematically decreased the role and capacity of regional governments and the local communities in controlling and managing human environment and natural resources in the country.

C. THE DEVELOPMENT OF INDONESIAN ENVIRONMENTAL LAW: FROM COLONIZED DUTCH ORDONNANTIE, BASIC ENVIRON- MENT MANAGEMENT ACT OF 1982

TO THE HUMAN ENVIRONMENT MANAGEMENT ACT OF 1997

In line to the development of environmental laws and regulations, Indonesia has historically experiences with the long period of Dutch Government colonization. Legal products that relate to the protection and management of natural environment and resources in the long period of Dutch colonization can simply be identified within *ordonnantie* and *reglement* (laws and regulations) which enacted by Dutch Government. To mention a few those of Dutch regulations are as follows:⁷

1. Perelvisserij,
Sponsenvisscherijordonnantie (Staatblad 1916 No. 157) i.e. Fishery Pearl Cultivation and Coral Reef Conservation Act No. 157/1916.
2. Visscherijordonnatie (Staatblad 1920 No. 396) i.e. Fishery Sanctuary Act No.396/1920.
3. Kustvisscherijordonnantie (staatblad 1927 No. 144) i.e. Fishery Act of 1927.
4. Hinderordonnantie (Staatblad 1926 No. 226 juncto Staatblad 1940 No. 450) i.e. Hindrance Act of 1940.
5. Bedrijfsreglementeringsordonnantie 1934 (Staatblad 1938 No. 86 juncto Staatblad 1958 No. 224).
6. Dierenbeschermingordonnantie (staablad 1931 No. 134) i.e. Wild Animal Protection Act of 1931.
7. Jachtordonnantie 1931 (Staatblad 1931 No. 133) i.e. Wild Animal Hunting Act of 1931).
8. Natuurmonumenten en
Wildreservatenordonnantie 1932 (Staatblad 1932 No. 17) i.e. Nature and Wild Animal Preserves Act of 1932.
9. Algemeen Waterreglement 1936 (Staatblad 1936 No. 489 juncto Staadblad 1949 No. 98) i.e. Water Act of 1936.

⁶ I Nyoman Nurjaya, *Pengelolaan Sumber Daya Alam dalam Perspektif Antropologi Hukum*, UM Press, Malang, 2006.

⁷ Kusnadi Hardjasoemantri, *Hukum Tata Lingkungan*, Gadjah Mada University Press, Yogyakarta, 1997, p. 82-84.

10. Jachtordinnantie Java en Madoera 1940 (Staatblad 1940 No. 733) i.e. Wild Hinting Act in Java and Madoera of 1940.
11. Natuurbeschermingordonnantie 1941 (Staatblad 1941 No. 167) i.e. Nature Preservation Act of 1941.
12. Stadsvormingsordonnatie 1948 (Staatblad 1948 No. 168) i.e. City Development Act of 1948.

The development of Indonesian Environmental Law has actually been influenced by the outcome of the United Nation Conference on Human Environment which was carried out by 5th to 16th June, 1972 in Stockholm, Swedia. Stockholm Declaration of 1972 mandated delegates from countries included Indonesia to establish the national environmental law with the purpose of preserving and improving human environment within the respective country.

The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world: it is the urgent desire of the peoples of the whole world and the duty of all Governments.

The natural resources of the earth including water, air, land, flora and fauna and especially representative samples of natural generation through careful planning or management as appropriate (Principle 2).

In the time of ten years after the conference, the Government of Indonesia at the first time enacted a national environmental law namely Basic Human Environmental Law of 1982 (UU No. 4 Tahun 1982 tentang Ketentuan-ketentuan Pokok Pengelolaan Lingkungan Hidup). This was firstly the only national law that particularly addressed to define and regulate the protection and management living environment of Indonesia for the advancement of general welfare of the whole people of Indonesia as stipulated in the 1945 Constitution.

The Act of 1982 was also enacted by the Government with the purpose of sustaining the capability of harmonious and balanced

living environment in order to support continued development by means of an integrated and comprehensive national policy with due consideration of the needs of present and future generations. A legal policy of protecting and developing the living environment in relation to the life among nations was also in accordance and compatible with the growing awareness of mankind's living environment. Hence, in order to establish the management of the human environment which based on an integrated and comprehensive national policy, it was decided to enact national legislation containing basic provisions as the basis for the management of the living environment in the country.

Ideology of the State in controlling and managing natural environment based mainly upon the Article 33 Paragraph 3 the 1945 Constitution. Hence, Article 10 of the Basic Human Environment Management Act of 1982 states that:

- (1) Natural environment and resources shall be controlled by the State and utilized for the maximum welfare of the people.
- (2) The utilization of man-made resource which affect the livelihood of the general public shall be regulated by the State for the greatest welfare of the people.
- (3) The right to control and regulate by the State as stated in Paragraph (1) and Paragraph (2) of this Article, gives authority to: (a) regulate the allocation, development, use, reuse, recycling, provision, management and supervision of resources as stated in Paragraph (1) and Paragraph (2) of this Article; (b) regulate legal actions and legal relations between person and/or other legal subjects pertaining to resources as mentioned in Paragraph (1) and Paragraph (2) of this Article; (c) regulate environmental taxes and retribution.
- (4) Further provisions pertaining to Paragraph (3) of this Article shall be establish by legislation.

Legal principles that defined within the Basic Human Environment Act of 1982 in the management of the living environment was the sustenance of the capability of the harmonious

and balanced environment to support sustained national development for the improvement of human welfare. Hence, the protection and management of the human environment mainly directed : (a) to achieve harmonious relationship between man and the living environment as an objective of the national development; (b) to control wisely the use and utilization of natural resources; (c) to develop the people of Indonesia individually and collectively as a proponent of the living environment; (d) to implement development with environmental consideration for the interest of present and future generations; and (e) to protect the nation against the impact of activities beyond the State's territory which causes environmental damage and pollution.

The legal foundation was based upon the principles of environmental law and on the obedience of everyone to these principles, all of which were in turn based upon the Archipelagic Concept namely *Wawasan Nusantara*. The Act of 1982 concerning Basic Provisions for the Management of the Human Environment possesses a number of characteristic as follows: (a) it is a simple and yet includes the possibility of development in the future, in accordance with present conditions, time and place; (b) it contains basic provisions as the basis for further regulations with regard to its implementation and enforcement; and (c) it encompasses all aspects of the living environment in order to form the basis for further regulations regarding each aspect, which shall be formulated in separate regulations.

In addition, the Act of 1982 will serve as the basis for the evaluation and adjustment of all legislations which regulate the management of natural environment and resources i.e. legislation concerning water resource, forestry, mining and energy, conservation of nature, industry, spatial use management, fishery, settlement, land use and tenure, and so forth. Therefore, all the mentioned legislations can be compiled within one system of Indonesian environmental law. It is the hope that the Basic Living Environment Management Act of 1982 which defines mainly principles and norms of human

environment management can perform its function as an umbrella act for the revise, adjustment, or establishment a new laws that relate to the protection and management of natural environment and resources. .

It is a legal fact that since more two decades before the enactment of the Basic Human Environment Management Act of 1982, a number of national law which is in line to the natural resources management have actually been enacted by the Government of Indonesia. Those are as follows:

1. Indonesian Water Territory Act No. 4/1960 (UU No. 4 Tahun 1960 tentang Perairan Indonesia).
2. Basic Agrarian Act No. 5/1960 (UU No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria).
3. Basic Forestry Act No. 5/1967 (UU No. 5 Tahun 1967 tentang Ketentuan-ketentuan Pokok Kehutanan).
4. Mining Act No. 11/1967 (UU No. 11 Tahun 1967 tentang Ketentuan-ketentuan Pokok Pertambangan).
5. Indonesian Sub-Continent Act No. 1/1973 (UU No. 1 Tahun 1973 tentang Landas Kontinen Indonesia).
6. Water Irrigation Act No. 7/1974 (UU No. 7 Tahun 1974 tentang Pengairan).

In relation to the progress of national law development in the country in supporting the application of national development policy, the Government enacted a number of laws and regulations based upon the Basic Living environment Act of 1982. Those are as follows:

1. Exclusive Economic Zone Act No. 5/1983 (UU No. 5 Tahun 1983 tentang Zona Ekonomi Eksklusif).
2. Ratification of The UN-Convention on the Law of the Sea Act No. 17/1985 (UU No. 17 Tahun 1985 tentang Pengesahan Convensi PBB tentang Hukum Laut)
3. Bio-diversity Conservation Act No. 5/1990 (UU No. 5 Tahun 1990 tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya).
4. Spatial Use Act No. 24/1992 (UU No. 24 Tahun 1992 tentang Penataan Ruang).

5. Ratification of The UN-Convention on Biological Diversity Act No. 5/1994 (UU No. 5 Tahun 1994 tentang Pengesahan Konvensi PBB tentang Keanekaragaman Hayati).
6. Forestry Act No. 41/1999 (UU No. 41 Tahun 1999 tentang Kehutanan).
7. Water Resource Act No. 7/2004 (UU No. 7 Tahun 2004 tentang Sumber Daya Air).
8. Fishery Act No. 31/2004 (UU No. 31 Tahun 2004 tentang Perikanan).

In 1992 the United Nations initiated the Earth Summit namely The United Nations Conference on Environment and Development conducted in Rio de Janeiro from 3 to 14 June 1992 with the purpose of reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972. Principle 4 of the Rio Declaration states that in order to achieve sustainable development,⁸ environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standard applied by some countries may be inappropriate and unwarranted economic and social cost to other countries, in particular developing countries (Principle 11).

It is, therefore, in line to those principles mentioned on the Rio Declaration of 1992, the Government of Indonesia need to adjust principles as well as improve substances of the Basic Human Environment Act of 1982. With the purpose of reaffirming

its environmentally-based commitments in the implementation of the national development policy, in 1997 the Government enacted the Human Environment Management Act No. 23/1997 (UU No. 23 Tahun 1997 tentang Pengelolaan Lingkungan Hidup) as to replace the Basic Living Environment Act of 1982.

It is confirmed that the Act of 1997 accommodates principles that contained within the 1992 Rio Declaration namely precautionary principle, information access principle, public participation principle, transparency principle, public accountability principle, sustainability principle, and utilization principle in the management of living environment to support sustainable development for the improvement of people's welfare of Indonesia. Those of principles have clearly been expressed within articles and paragraphs of the Act of 1997 which was employed as an umbrella provision by the Government to integrate those of related natural environment laws and regulations.

Legal norms which include within the Act of 1997 contain elements of the legal science itself namely aspects of public law, administrative law, private law, and penal law. Those are as follows:

1. Legal aspects of public law comprise a number of regulations i.e. (a) scope of living environment jurisdiction, (b) environmental management mandated principles, (c) rights and obligations of the people and entrepreneurs in particular, (d) authorities of the Government in controlling and managing human environment, (e) integrated environmental State's institutions principle, as well as (f) de-centralization, de-concentration, and *medebewind* principles in the context of delegation of authority in the management of living environment.
2. Legal elements of administrative law include regulations for (a) environmental quality standardization, (b) environmental impact assessment, (c) poisoned-industrial waste management and control, (d) industrial license management, (e)

⁸ E.Kula, *Economics of Natural Resources, The Environment and Policies*, Chapman & Hall, London, 1994, p.31; Daud Silalahi, *Hukum Lingkungan dalam Sistem Penegakan Hukum Lingkungan Indonesia*, Alumni, Bandung, 2001.

- imported industrial waste control and management, (f) local government environmental control duty, (g) administrative sanctions, and (h) environmental audit.
3. Legal parts of private law encompass those of principles and mechanism of environmental dispute settlement. Those are as follows: (a) litigation and non-litigation dispute settlements, (b) alternative environmental conflict resolution, (c) strict liability, (d) class action claim, and (e) legal standing of environmental organization.
 4. Criminal law aspects of the Act of 1997 covering (a) institutions and authorities of environmental investigation, (b) form of illegal environmental behaviors; (c) environmental pollution and damage responsibility, (d) sort of legal subjects in environmental crimes, (e) kind of penal sanctions and certain legal actions, and (f) classification of environmental crime.

Those legal norms which covered within the Human Environment Management Act of 1997 in principally dedicated to the implementation of environmental justice, democratization, and sustainability principles in controlling and managing human environment as stipulated in the 1945 Constitution. The Act of 1997 has normatively been a mainly legal instrument employed by the Government to handle settle environmental problems and cases which remain occur increasingly in the process of national development which tend to be directed to the industrial and economical development.

D. INDONESIAN ENVIRONMENTAL LAW: ENVIRONMENTAL JUSTICE SYSTEM AND ENFORCEMENT

The Act of 1997 has been a system of regulation in line to the human environment control and management as legal instrument to preserve and protection natural resources and environment within the territory of Indonesia. Hence, it would be an interesting one to

observe legal fact concerning the question of environmental law justice system and enforcement of the Act of 1997.

To begin with it should be confirmed that the Act of 1997 contains the bulk of substantive law as well as procedural law which define elements of constitutional law, administrative law, civil law, as well as criminal law. Environmental justice system and enforcement which regulated within the Act of 1997 refer to the administrative procedural law, civil procedural law, and penal procedural law. Those are mainly directed to the procedural regulations pertaining to enforcement of the Act and form of sanctions that can be threatened for environmental law infractions.

Scope of the administrative justice system which regulated within the Act of 1997 encompass enterprise operational license procedural, supervision and control duties of the Minister of Environmental Affairs, and environmental administrative sanction. Article 22 explains that Minister of Environment Affairs has an authoritative to conducts supervision and control upon those of entrepreneurs for the compliance of laws and regulations with relate to living environment (Paragraph 1). Those of supervision and control authoritative can be handed over to certain ministry officials (Paragraph 2), as well as to be decentralized to regional Government officials (Paragraph 3). Sort of administrative sanction mentioned within Article 27 Act of 1997 which states that certain environmental violation shall be threatened by cancellation of the enterprise operational license (Paragraph 1). For this purpose the regional Government posses an authority given by the authoritative official to propose cancellation of the operational license (Paragraph 2), as well as stakeholders which suffer economic and social losses can be able to propose a request to the authoritative official for the revocation of business operational license (Paragraph 3).

Justice system and enforcement of the civil law within the Act of 1997 mostly regulate procedural and mechanism of environmental dispute settlement. Within the Article 30 defined that those of environmental

disputes can be settled by litigation procedure namely in-court resolution or non-litigation mechanism that is out-court settlement based upon pleased choice of the parties. Purpose of both alternative environmental dispute resolution namely litigation and non-litigation have been principally directed to gather financial compensation for the plaintiff and certain environmental action and rehabilitation must be conducted by the accused (Article 31 and 34). It is interesting to be paid close attention to the regulation of strict liability principle within the Act of 1997. It is clearly regulated within Article 35 that enterprise and or business activities which cause seriously environmental pollution and damage due to employ hazardous and poisoned raw materials within production process, and therefore produce the dangerously industrial waste, must be charged a strictly liability for the financial loss which directly suffered by plaintiff party. The suffer financial loss must be directly paid by the accused party (Paragraph 1).

This kind of legal obligation of the accused shall be released in case the accused can make his proof convincing that seriously environmental pollution and or damage caused by natural disaster or war, and or force majeure, and or the illegal action of the third party (Paragraph 2). Consequently, in term of civil procedural law the accused shall be burdened an alleviating or shifting of burden of proof by the judge in the process of adjudication. The essence of this kind of liability is actually transferring legal responsibility of fault to a risk of the environmental pollution and damage that increasingly and continually appear throughout the world in conjunction with the rapid development of industrial technology.

In sum, this is the so called the transference of liability based on fault principle to strict liability principle within the Human Environment Management Act of 1997. Hence, in accordance to the civil procedural law, strict liability principle defined as *lex specialist* (special regulation) in contradiction with *lex generalis* (general

regulation) particularly in the adjudication process of private law suit.

In the Article 37 stipulated that people have right to address representative legal claim to the court and or convey environmental law violation report to the law enforcement agencies in relation to suffer financial loss due to the environmental pollution and or damage (Paragraph 1). This is the so called regulation of class action principle within the Act of 1997. What the purpose of this sort of legal accusation is to extend legal subject within the environmental legal cases to claim their legal right from individual claim into collective claim of the people who suffer financial loss due to the improvement of environmental problems in the country.

In order to improve responsibility of the civil society in accordance to the partnership principle in decreasing environmental problems, it is explicitly regulated within the Article 38 that environmentally-based non-government organizations (NGO's) has right to bring law suit against the polluters in the name of living environment with the purpose of protecting its capacity and function and (Paragraph 1). This is the so called legal standing principle that clearly defined within the Act of 1997. The legal standing principle in the global environmental law historically first introduced by Professor Christopher Stone within his article entitled "Should Trees Have Standing?: Toward Legal Rights for Natural Objects".⁹ He has actually employed guardian theory in promoting legal rights to natural objects such like river, lake, forest, coast, sea, bio-diversity etc. Those are natural resources and environment. In conjunction to this guardian theory, it should be confirmed that natural environment and resources are naturally legal subject in environmental policy and legislation. Nevertheless, due to their

⁹ Mas Achmad Santosa and Sulaiman Sembiring, *Hak Gugat Organisasi Lingkungan (Environmental Legal Standing)*, ICEL, Jakarta, 1997. p. 11; Mas Achmad Santosa, *Good Governance and Hukum Lingkungan*, ICEL, Jakarta, 2001.

nature of inanimate natural objects it is, therefore, they should be legally represented by environmentally-based NGO's.

Elements of penal law within the Human Environment Management Act of 1997 regulated environment criminal justice system, form of penal sanctions, sort criminal behaviors of corporation that cause environment pollution and or damage, other non penal sanctions, and qualification of the environmental criminality. As pointed out within penal procedural law of 1981 that is Kitab Undang-Undang Hukum Acara Pidana (KUHP), law enforcement agencies performed by police, general attorney, and judge of the court. It should be confirmed that there has no been a particular environmental criminal justice namely the court that specifically provided to settle and adjudicate environmental violation cases within the system of penal procedural law of Indonesia. Hence, those of environmental criminal cases adjudicated within the general court hierarchically namely State Court, High Court, and Supreme Court.

In the Article 41 Paragraph 1 defined that whosoever included corporation does intentionally action which causes pollution and or damage of the living environment shall be liable of imprisonment to a maximum of 10 (ten) years and a fine to a maximum of Rp. 500.000.000 (five hundred millions rupiah). In case that intentionally action causes death man or serious injury shall be liable to punishment of imprisonment to a maximum of 15 (fifteen) years and a fine to a maximum of Rp. 750.000.000 (seven hundred fifty millions rupiah). Article 42 regulates those of whosoever included corporation through negligence does action which causes pollution and or damage of the living environment shall be liable to punishment of imprisonment to a maximum of 3 (three) years and a fine to a maximum of Rp. 100.000.000 (hundred millions rupiah).

The other kind of penal sanction which can also be burdened to the environment violators formulated as tindakan tata tertib that is environmental ordering action that must be done by the polluters (Article 47). Those sort

of tindakan tata tertib are as follows: (a) confiscate all benefits that obtained from environment violations; (b) officially closed part or a whole of the corporation; (c) environment rehabilitation and restoration that caused of pollution and damage; (d) take action appropriately that have to be done caused of negligence illegally; (e) change the action that caused of negligence illegally; and or (f) replace the corporation under the officially guardian of a maximum 3 (three) years.

Justice system and enforcement that formulated within the Act of 1997 defined that kind of environmental violations are felony and not misdemeanor (Article 48). It is because the natural environment is actually a system of human life that should be protected and utilized wisely for the sustainability of human being of present and future generations. Hence, it could be mentioned that environmental violation is an environmentally crime categorized as felony, and environmental felony is an extraordinary crime that classified as crime of humanity.

E. CLOSING NOTES

Crucial point that interesting to be taken into observe is the empirical legal fact of the Act of 1997 within the system of environmental law enforcement in line to the management of living environment of Indonesia. Most environmental law cases such like air, lands, and water pollutions can mostly be found in the area of industry estates, as well as in the long Ciliwung river watershed of West Java, Semarang river of Central Java, and Brantas river of East Java. Hundred of chemical-based industries have been operating their business activities and throw away poisoned waste into the rivers freely. Those of illegal loggings, illegal fishing, and illegal mining which cause living environmental seriously damages have mostly been occurred in the outer islands namely Papua, Maluku, Kalimantan, Sulawesi, and Sumatera islands.

It is the question of environment law enforcement in the country. More than hundred cases of natural environment

pollutions and damages throughout the regions of Indonesia have become official legal cases in the hand of law enforcement apparatus namely police, public prosecutor, and judge of the court. Nevertheless, it could be easily accounted by the fingers what number of environmental pollution and damage legal cases which seriously settled and enforced by official decisions of the judges in the system of environmental law enforcement system based on the substantive and procedural penal law, Human Environment Management Act of 1997, as well as other Acts which relate to natural environment management. This is the so called ineffectively law enforcement in the level of empirical environmental policy and legislations of Indonesia. In order to find out an appropriate answer of why ineffective environmental law enforcement, it will be relevant to observe and analyze this specific environmental law problem by employing law as a system theory introduced by Lawrence M. Friedman.¹⁰

The Human Environment Management Act of 1997 and other natural resources management Acts have been an environmental legal system of Indonesia which encompass substance of law, structure of law, and the legal culture of society and law enforcement apparatus. Those elements of legal system are strictly related and completed each other, and one is not able to separate from the others. It is, therefore, effective or ineffective of the environmental legislations as a system of law will strongly influenced by performance of those elements of substantive, structure, and legal culture as well. In one hand, the implementation of substantive law will be depended on the performance of the structure namely law enforcement officials such like police, public prosecutor, and judge of the court in the level of enforcement. And on the other hand, legal culture that contains value, believes, perception, attitude, and the hope of society, as well as attitude and behavior of law

enforcement officials will actively define whether environmental law enforcement will be effective or ineffective in the stage enforcement.

Environment justice system and enforcement which defined and regulated within the Act of 1997 have been normatively appropriated to handle and settle natural environmental problems and cases in the country. Those global environmental policy and management principles based upon Stockholm Declaration of 1972 and Rio Declaration of 1992 have also been adopted and accommodated within the laws and legislations which relate to the natural environment and resource management. In sum, there has been a seriously legal problems faced by the Government of Indonesia in the sense of empirical law enforcement upon the extraordinary environmental crime and criminality of humanity in the country. It is recommended that the Government as well law enforcement institutions and officials should pay more seriously political will and politically legal action in fighting and coping environmental cases and problems in all over the regions of Indonesia.

In sum, in order to protect, conserve, and manage natural environment and resources sustainability for the welfare of the people, as well as to maintain implementation of environmental justice system and enforcement in the country, the existing natural environment and resource laws and regulations must consistently be enforced fairly and indiscriminating to whosoever violate the environmental law and legislation.

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¹⁰ Lawrence M. Friedman, *The Legal System, A Social Science Perspective*, Russel Sage Foundation, New York, 1975, pp. 11-17.

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